

NOTICE

*Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

IZAZ ELVIN KHAN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-9552  
Trial Court No. 3UN-04-340 CR

MEMORANDUM OPINION

No. 5996 — December 11, 2013

Appeal from the Superior Court, Third Judicial District,  
Unalaska, Sharon L. Gleason, Judge.

Appearances: Renee McFarland, Assistant Public Defender,  
and Quinlan Steiner, Public Defender, Anchorage, for the  
Appellant. W. H. Hawley, Assistant Attorney General, Office  
of Special Prosecutions and Appeals, Anchorage, and Michael  
C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheim, Chief Judge, Coats, Senior Court of  
Appeals Judge, and Andrews, Senior Superior Court Judge\*.

Judge MANNHEIMER, writing for the Court and concurring  
separately.

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\* Both senior judges are sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Izaz Elvin Khan was charged with a single count of perjury for making four false statements of fact in an affidavit he submitted in support of a request for court-appointed counsel — statements that under-reported Khan’s assets and his income.

Khan ultimately acknowledged that all four statements were indeed false, but he argued that he had not acted with the culpable mental state required by the perjury statute — to wit, knowingly making statements that he did not believe to be true. *See* AS 11.56.200(a).

At Khan’s trial, with his attorney’s explicit approval, the judge instructed the jurors that they did not need to reach unanimous agreement regarding any single one of the four false statements in Khan’s affidavit. Instead, the judge instructed the jurors that Khan could be convicted of perjury if all the jurors agreed that Khan acted knowingly with respect to at least one of these statements, even if the jurors did not unanimously agree on the identity of that statement.

After Khan was convicted, he filed an appeal in which he argued for the first time that this jury instruction was improper. Khan asserted that he was legally entitled to demand jury unanimity with respect to each of the four false statements.

This Court did not directly decide the jury unanimity issue when we resolved Khan’s appeal. Rather, we held that even if Khan was correct (*i.e.*, if he was entitled to jury unanimity with respect to each of the four statements), the challenged jury instruction was harmless under the facts of his case. *See Khan v. State (Khan I)*, 204 P.3d 1036,1042-43 (Alaska App. 2009).

Following this Court’s affirmance of his conviction, Khan petitioned the Alaska Supreme Court to review our decision. In *Khan v. State (Khan II)*, 278 P.3d 893, 901 (Alaska 2012), the Supreme Court vacated this Court’s decision on the jury instruction issue and directed us to reconsider this issue using the plain error analysis set forth in *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011).

We have re-examined Khan’s case using the *Adams* plain error test, and we again conclude that any error in the jury instruction was harmless. We therefore affirm Khan’s conviction.

### *Underlying facts*

In October 2004, Khan was in jail in Unalaska, facing unrelated criminal charges. At his request, a jail employee supplied him with the paperwork necessary to apply for court-appointed counsel. Khan completed this paperwork — including a required financial statement — and he signed the application under oath.

In his financial statement, Khan provided information about his current income, his past income, his current and past employment, and his assets. Khan declared that he was not currently working, and that he had not worked for the preceding three years (more specifically, since September 2001). In the space provided for a list of his employers in the preceding year, Khan listed “None”. Khan also declared that he had no current monthly income, and that he had received no income during the preceding twelve months. In the portion of the financial statement labeled “Cash and Assets”, Khan left the majority of the questions blank, and he answered “None” on the line where he was supposed to give the total value of his assets. Khan repeatedly answered “no” or “none” on the lines calling for him to give the amount of his income and to list the values of his assets.

The truth was that Khan had worked sporadically since mid-2001. According to records kept by the Alaska Department of Labor, Khan worked during twelve of the thirteen fiscal-year quarters between September 2001 and October 2004. Khan had also been employed by at least two different employers during the twelve months immediately preceding his act of applying for appointed counsel.

Moreover, according to records kept by the Alaska Division of Motor Vehicles, Khan owned a vehicle (a Toyota pickup truck) at the time he applied for appointed counsel.

Based on these false answers in the financial statement, Khan was indicted on one count of perjury.

Jury selection for Khan's trial began on April 12, 2005, but it was not completed that day. The parties returned to court on the morning of April 13th to complete the jury selection process. But before the judge resumed the selection of Khan's jury, she asked the attorneys to discuss various preliminary matters. One of these matters was jury instructions.

During this discussion of jury instructions, Khan's attorney took issue with the following instruction proposed by the State:

You are instructed that there are alternative theories by which the defendant may be found guilty of this charge. You need not be unanimous regarding which theory the prosecution has proven. It is sufficient that you each agree that the prosecutor has proven at least one of the theories beyond a reasonable doubt. If you are so satisfied, then you shall find the defendant guilty, notwithstanding the fact that you may not have reached complete unanimity as to which theory of guilt applies to the case. This is not required by the law.

However, the defense attorney did not object to this proposed instruction on the ground that it deprived Khan of the right to jury unanimity. Rather, the defense attorney told the judge that she thought this instruction "was not necessary".

In response, the prosecutor clarified that this instruction was about the various false statements that Khan made in his financial statement. According to the prosecutor, each individual false statement constituted a separate "theory" under which

the jury could find Khan guilty of perjury. In other words, under the proposed instruction, the jurors would not need to reach unanimous agreement as to which particular false statement justified Khan's conviction for perjury.

After the prosecutor offered this explanation, the trial judge asked Khan's attorney whether she continued to object to the instruction. Khan's attorney answered "No."

A little later, after discussion of some other preliminary matters, the judge summoned the jury panel to the courtroom and jury selection resumed (and was completed).

At Khan's trial, the State introduced the testimony of several witnesses, as well as supporting exhibits, to prove the falsity of Khan's statements about his income, employment, and assets. An employee of the Division of Motor Vehicles testified that Khan owned a pickup truck at the time he filled out the financial statement. An employee of the Department of Labor testified about Khan's employment history during the preceding three years. Two other witnesses — employees of the City of Unalaska — testified that they had seen Khan working, and one of these witnesses said that he had seen Khan driving his Toyota.

The defense did not call any witnesses or introduce any evidence to rebut the State's case. Indeed, both in her opening statement at the beginning of the trial and in her closing argument at the end of the trial, Khan's attorney conceded that Khan's various assertions in the financial statement were false. However, the defense attorney argued that Khan did not commit perjury because he did not have the *mens rea* required by the statute — *i.e.*, he did not act with a contemporaneous belief or recognition that the various statements were false.

In both her opening statement and closing argument, the defense attorney emphasized that Khan was incarcerated at the time he filled out the financial statement,

and she suggested that Khan was in an “agitated” or “frightened” state. The defense attorney argued that Khan’s emotional state, and his dire financial circumstances, led him to make the false statements without consciously recognizing or paying attention to their falsity.

The jury found Khan guilty as charged.

*Does the challenged jury instruction constitute plain error?*

When a defendant claims on appeal that an error occurred in the lower court, but the defendant did not properly object to this error during the lower court proceedings, the defendant must normally show that the error qualifies as a “plain error” under Criminal Rule 47(b).

As explained in the Alaska Supreme Court’s decision in *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011), a defendant pursuing a claim of plain error must establish these five things: (1) that the claimed error was indeed error; (2) that the defendant (or their attorney) did not make a tactical decision to refrain from objecting; (3) that the error was obvious, in the sense that it should have been apparent to any competent judge or lawyer; (4) that the error affected the defendant’s substantial rights, in the sense that it involved the fundamental fairness of the lower court proceeding; and (5) that the defendant was in fact prejudiced by the error.

As noted in *Adams*, this fifth element of the test — that the error resulted in actual prejudice to the defendant — requires some clarification. If the error was not a violation of the defendant’s constitutional rights, then the “prejudice” prong of the plain error test requires the defendant to show a reasonable likelihood that the error affected the outcome of the proceeding. *Adams*, 261 P.3d at 773. But if the error *did* violate the defendant’s constitutional rights, then the “harmless beyond a reasonable

doubt” test applies. *Ibid.* Thus, the defendant is entitled to relief unless the State shows that there is no reasonable possibility that the error affected the outcome of the lower court proceedings.

We now turn to the question of whether these five elements are established under the facts of Khan’s case.

The parties disagree on every element except the fourth one. That is, the parties disagree about whether the jury instruction was erroneous — and, assuming the jury instruction was erroneous, the parties disagree as to whether Khan’s attorney made a tactical decision to let the trial proceed despite the error, and whether a competent judge should have perceived the error and acted to cure it *sua sponte*. Finally, the parties disagree about whether the alleged error actually prejudiced Khan.

The only thing the parties *do* agree on is that, if it was indeed error to instruct the jury in this manner, the error was of constitutional dimension, and thus it is the State’s burden to persuade this Court that the error was harmless beyond a reasonable doubt.

Even though the parties disagree about how to apply the first three elements of the plain error test to the facts of Khan’s case, we need not resolve their disputes on these three elements. Even assuming (1) that jury unanimity was indeed required with respect to each of Khan’s false statements, and (2) that the failure of the jury instruction to require jury unanimity was an error that should have been apparent to any competent judge or attorney, and (3) that the defense attorney’s decision to withdraw her objection to the jury instruction was not tactical, we nevertheless agree with the State that the error was harmless beyond a reasonable doubt.

*Assuming the jury instruction was erroneous, the error was harmless beyond a reasonable doubt given the facts of Khan's case and the way it was litigated*

Assuming that the challenged jury instruction constituted an obvious error that defeated Khan's constitutional right to jury unanimity, the remaining question is whether the error in the instruction was harmless beyond a reasonable doubt.

As this Court explained in *Anderson v. State*, 289 P.3d 1, 7 (Alaska App. 2012), "To determine whether the lack of a unanimity instruction was harmless beyond a reasonable doubt, [the appellate court] must ask whether, if [the] jury had received a proper instruction on factual unanimity, there is a reasonable possibility that the jury's verdict[] would have been different."

To answer this question, we must examine the evidence offered by the State in support of its four allegations of false statement, as well as the nature of Khan's defense.

As we explained at the beginning of this opinion, Khan submitted a request for court-appointed counsel that was supported by a financial statement that he made under oath. In this financial statement, Khan falsely declared that he had not worked during the preceding three years, that he had no current monthly income, and that he had received no income during the preceding twelve months. In the portion of the financial statement labeled "Cash and Assets", Khan left the majority of the questions blank, and he answered "None" on the line where he was supposed to give the total value of his assets.

At Khan's trial, the State introduced the testimony of several witnesses, as well as supporting exhibits, to prove the falsity of Khan's statements about his income, employment, and assets. This testimony was unrebutted; the defense did not call any witnesses or introduce any evidence. In the defense attorney's opening statement



(delivered at the beginning of the trial) and in her summation to the jury at the end of the trial, the defense attorney conceded that Khan’s various assertions in the financial statement were false. The issue, the attorney told the jurors, was Khan’s mental state when he filled out the financial form.

The defense attorney argued that Khan was in an “agitated” or “frightened” state of mind when he filled out the form — and that, because of this emotional state, Khan was so distracted when he filled out the form that he did not consciously think about the falseness of his answers.

Given this record, there is no reason to believe that the jury drew distinctions among the State’s four allegations of false statement — either with regard to the strength of the State’s evidence supporting each allegation, or with regard to the plausibility of Khan’s defense to each allegation.

This Court addressed similar situations in *State v. Covington*, 711 P.2d 1183 (Alaska App. 1985), and *Anderson v. State*, 289 P.3d 1 (Alaska App. 2012).

In both *Covington* and *Anderson*, the defendants were charged with sexually abusing minors. The indictments included counts that encompassed several alleged acts of abuse, but the trial judges erroneously failed to tell the jurors that the defendants could not be convicted unless the jurors reached unanimous agreement as to the particular conduct underlying each count.<sup>1</sup> Nevertheless, we concluded in each case that the error in the jury instructions was harmless because the defendants presented a uniform defense to all the counts they faced: that they had never abused the victims, and that the victims’ accusations were knowingly false.<sup>2</sup>

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<sup>1</sup> See *Covington v. State*, 703 P.2d 436, 440-41 (Alaska App. 1985); *Anderson*, 289 P.3d at 4.

<sup>2</sup> *State v. Covington*, 711 P.2d at 1185; *Anderson*, 289 P.3d at 7-8.

Thus, in both *Covington* and *Anderson*, we examined the nature of the State's evidence and the nature of the offered defense — and, based on these, we concluded that the error in the jury instructions was harmless beyond a reasonable doubt — that there was no reasonable possibility that the juries' verdicts would have been different if they had been correctly instructed regarding the need for factual unanimity.<sup>3</sup>

Khan argues that his case is distinguishable from *Covington* and *Anderson*, in that the jurors may have had separate doubts as to whether Khan acted with the required culpable mental state in connection with some of his false statements. But the record does not support this contention.

Khan's attorney offered no evidence that any of the four statements was actually true, and the defense attorney's argument concerning Khan's mental state was not presented in a way that applied to some of Khan's statements more than others. Instead, the argument about Khan's mental state was a blanket defense to all four allegations of perjury.

We therefore conclude that even if the jurors should have been required to reach unanimity with respect to each of the State's four allegations, the error in the jury instruction was harmless beyond a reasonable doubt.

### *Conclusion*

The judgement of the superior court is AFFIRMED.

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<sup>3</sup> *Covington*, 711 P.2d at 1185; *Anderson*, 289 P.3d at 8.

Judge MANNHEIMER, concurring.

I write separately to analyze two of the contentions that the lead opinion does not address.

*(a) Was the challenged jury instruction erroneous?*

The State contends that the challenged jury instruction was not erroneous at all, but rather was an accurate statement of the law. The State takes the position that, no matter how many false assertions of fact are contained in Khan’s financial affidavit, his submission of this affidavit constituted only a single act of perjury.

More specifically, the State argues that the false assertions in the document did not constitute the offense of perjury until Khan transformed the document into an affidavit by swearing to the truth of those assertions. Thus, the State argues, Khan did not commit several acts of perjury, but only one — when he swore that all of the factual assertions in the affidavit were true.

I acknowledge that the word “statement” has two different (but related) meanings in this context. A “statement” can refer to a series of interrelated assertions of fact — as when a person gives a statement to the police, or provides a financial statement to the court. But “statement” can also refer to any individual assertion of fact. For example, this is how the word “statement” is used in the definition of hearsay; see Alaska Evidence Rule 801(a).

As this Court explained in our prior decision (*Khan I*), Alaska’s perjury statute appears to use “statement” in this latter sense. See AS 11.56.240(1), as well as our discussion of this statute, and the pertinent case law, in *Khan I*, 204 P.3d at 1041-42.

Moreover, the State’s argument leads to results that seemingly make little sense.

The State takes the position that Khan committed only a single act of perjury because (1) he wrote down four false statements about his income, his employment, and his assets and (2) *then* he swore that these statements were true. But assumedly, the State would agree that if Khan had appeared personally before a judicial officer to apply for court-appointed counsel, and if Khan had been placed under oath and had sworn to tell the truth *before* he made the four false assertions about his income, his employment, and his assets, then Khan would have committed four separate acts of perjury.

I doubt that the legislature contemplated such disparate results depending on whether perjury defendants (1) swear that all of the factual assertions they *are about to make* are true, or (2) swear that all of the factual assertions they *have just made* are true. However, as the lead opinion explains, there is no need to resolve this issue.

*(b) Assuming the jury instruction was erroneous, did Khan’s attorney make a tactical decision not to object?*

Regarding the second element of the plain error test, the State contends that Khan’s attorney made a tactical decision to refrain from objecting to the jury instruction. If, for these purposes, “tactical decision” means “conscious decision”, then the record fully supports the State’s position.

As the lead opinion explains, the trial judge and the attorneys discussed various preliminary matters — including jury instructions — on the morning of the second day of Khan’s trial, before jury selection was complete. At that time, Khan’s attorney expressly objected to the jury instruction at issue here. During the ensuing

discussion, the prosecutor explained that the purpose of the instruction was to allow the jury to convict Khan of perjury even though the jurors might not reach unanimous agreement with respect to any single one of his four alleged false statements. The trial judge then asked Khan's attorney whether she continued to object to the instruction, and Khan's attorney answered "No."

But on appeal, Khan argues that even when the record shows that a defendant's attorney consciously refrained from objecting — or, as here, expressly withdrew a previous objection — the defense attorney's action does not constitute a "tactical decision" for purposes of the plain error rule unless the State proves that the defense attorney intended to obtain some identifiable benefit by refraining from objecting.

Khan's suggested analysis is problematic because it would seemingly require an appellate court to make a finding about the defense attorney's specific reasons for failing to object. Appellate courts do not weigh evidence, nor do we make findings of fact. Thus, an appellate court is not able to make findings about people's mental states — in particular, a finding about a defense attorney's actual reasons for failing to object.

Concededly, some of the previous decisions involving the doctrine of plain error contain language suggesting that an appellate court is supposed to make such findings of historical fact. But this is incorrect.

An appellate court can examine a trial court record to see if it suggests that a reasonable attorney in the defense attorney's position would have been, or might have been, motivated by tactical considerations. But an appellate court can not make findings regarding a particular defense attorney's actual state of mind.

And, at least in the normal case, the trial judge will not have made a factual finding for an appellate court to review — because trial court proceedings normally do

not include any direct litigation of this issue (unless the defendant has pursued a motion for a new trial based on a claim that their attorney was incompetent for failing to object).

There is another problematic aspect to Khan’s suggested analysis: his assertion that a defense attorney’s decision to refrain from objecting does not qualify as “tactical” unless the attorney had a specific benefit in mind.

Broadly speaking, there are three reasons why an attorney might fail to object to some occurrence in the trial court.

The first reason is ignorance. If an attorney is ignorant of the pertinent law, the attorney may fail to object because they do not notice the error, or because they fail to perceive the ramifications of the error. (Alternatively, if the attorney is ignorant of a pertinent procedural rule or requirement, the attorney may object, but fail to make the objection in the proper form or in a timely manner.)

The second reason is indifference. If the attorney perceives the error (or the possibility of error), but if the attorney has chosen a litigation strategy that renders the error harmless or inconsequential, the attorney may consciously refrain from objecting because the point is insignificant.

The third reason is conscious strategy — but this encompasses two distinct situations.

An attorney may conclude that objecting to a perceived error is not worth the trouble or the risk. For example, there are situations where an attorney might not be able predict what ruling the trial judge would make if the attorney objected — thus rendering it difficult to weigh the potential benefits of objecting against the potential disadvantages.

Alternatively, an attorney may consciously refrain from objecting because there is a clearly identifiable benefit to not objecting. This identifiable benefit may be a specific litigation advantage in the trial court — for instance, where the prosecutor asks

objectionable questions on direct examination, but these questions open up promising lines of cross-examination. Or the benefit may come in the form of “sandbagging” — “the deliberate [decision] by defense counsel to allow reversible error into a criminal trial as an insurance policy against an adverse verdict”.<sup>1</sup>

In Khan’s case, the defense attorney had a clear opportunity to object to the jury instruction. Indeed, she *did* object to the instruction — but a few minutes later, she told the trial judge that she did not wish to press her objection.

If we assume that Khan’s defense attorney knew, or at least suspected, that Khan’s four false statements constituted four discrete acts of perjury, then Khan’s attorney could have continued to object to the prosecutor’s proposed jury instruction. But if the defense attorney had continued to object, this almost certainly would have revealed the underlying procedural difficulty: that these four arguably discrete acts of perjury were joined together in a single duplicitous count.

In *Carman v. State*, 658 P.2d 131 (Alaska App. 1983), this Court held that the rule against duplicitous indictments “is a rule of pleading[,] not substance” — and that, “upon motion, two crimes improperly joined in a single count can be segregated into separate counts in the same indictment.” *Id.* at 139 (citing *Trounce v. State*, 498 P.2d 106, 111 (Alaska 1972)).

If Khan had had significantly different defenses to the four separate acts of perjury, then conceivably he would have been better off with jury instructions that required the jurors to deliberate separately on each of these four acts of perjury — thus forcing the jury to acquit him unless all twelve jurors agreed that the State had proved one or more specific acts of perjury.

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<sup>1</sup> Paul T. Wangerin, “*Plain Error*” and “*Fundamental Fairness*”: *Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DePaul Law Review 753, 754 (1980).

But Khan had one uniform defense to all four acts of perjury. That being the case, Khan was better off having the four acts of perjury combined into a single count. That way, if the jurors rejected Khan’s blanket defense, Khan would be convicted of only one count of perjury, not four.

In his brief to this Court, Khan argues that his trial attorney did not actually face this dilemma, because there was essentially no chance that the trial judge would allow the State to amend the indictment to charge four separate counts of perjury. Khan notes that, under Alaska Criminal Rule 7(e), an indictment can not be amended once the trial has begun if, as a result of the amendment, “[an] additional or different offense [would be] charged and the substantial rights of the defendant [would be] prejudiced.”

But although the events at issue in Khan’s case occurred during the trial proceedings, these events occurred *before* jury selection was completed — in other words, before jeopardy attached.<sup>2</sup>

Given this circumstance, Khan’s attorney might reasonably fear that if she objected to the jury instruction, and if she thereby revealed the duplicity problem in the indictment, the trial judge might decide to continue the trial and allow the State to reformulate the indictment into four separate counts. Since the defense attorney intended to present a single, uniform defense, a continuance of trial would not aid the attorney’s trial preparation — but splitting the indictment into four counts would put Khan in a significantly worse position if the jury rejected his blanket defense.

For these reasons, one might reasonably conclude that the defense attorney’s decision to withdraw her objection to the jury instruction was “tactical”, even

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<sup>2</sup> When a criminal case is tried by jury, jeopardy attaches when the jury is sworn. *Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008).



under the narrow definition that Khan is proposing (*i.e.*, not just a deliberate decision, but a deliberate decision made with the intention of achieving a specific benefit).

However, as the lead opinion explains, there is no need to resolve this issue either.